MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

16-84-LI

April 4, 1984

Ms. Susan A. Rourke, ACSW
Executive Director
Citizens for Better Care
1553 Woodward Avenue, Ste 525
Detroit, Michigan 48226

Dear Ms. Rourke:

This is in response to your inquiry concerning the lobby act (the "Act"), 1978 PA 472. I understand that you were sent information on January 25, 1984, concerning your first question so I will not further discuss the definition of lobbyist and lobbyist agent except as necessary to answer your other questions, which will be discussed below.

1. As part of the activities of your organization, and "as a matter of process, formal hearings on complaints are requested of the Director of MDPH or MDSS." Are such requests lobbying?

2. "Is picketing of the state offices or legislature considered lobbying?"

3. "Is attendance at meetings of public bodies considered lobbying? When such a meeting is attended and a statement made, is only the time making the statement counted as lobbying, or the full time of attendance?"

"Lobbying" is defined in section 5(2) of the Act (MCL 4.415) as " . . . communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action." As was pointed out in the "Overview" sent to you earlier, many of the terms used in section 5(2) are also specifically defined for the purposes of the Act.

Generally, formal hearings before the Director of the Michigan Department of Public Health or the Michigan Department of Social Services are administrative proceedings which are governed by 1969 PA 306 - the Administrative Procedures Act. Such actions may seem to be included in the above definition as a type of action which may be influenced; however, section 2(1) of the Act (MCL

4.412(1)) provides that "Administrative action does not include a quasi-judicial determination as authorized by law." The Michigan Court of Appeals in Pletz v Secretary of State, 125 Mich App 335 (1983) discussed this exemption at page 352, stating:

> "We consider that the exemption removes contested matters before administrative officers, such as referees, hearing officers and commissioners, from the scope of the lobby law."

"Quasi-judicial" has been held to mean:

> "A term applied to the action, discretion, etc. of public administrative officers, who are required to investigate facts or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." Black's Law Dictionary (4th Ed.) p 1411 (1968)

The Court in Pletz also cited with approval the following definition from People ex rel Clardy v Balch, 268 Mich 196, 200 (1934):

> "When the power is conferred by statute upon a commission such as the public utilities, or a board such as the department of labor and industry, to ascertain facts and make orders founded therein, they are at times referred to as quasi judicial bodies, but their members are in no sense judicial officers within the meaning of that term as used in the exception in the constitutional provision . . . . " (emphasis added)

From a communication on March 5, 1984, with staff, I understand that you are concerned about "formal hearings on complaints" as well as appeals which go directly to the directors of the departments you mentioned. It is the Department's position that whenever an adversarial administrative matter has commenced and the controversy is slated for resolution through the administrative hearing process, the exemption found in section 2(1) applies. While there may be some question about specifically where that exemption commences, (that is, the minimum contact required to trigger the exemption) it is the Department's position that the exemption clearly applies to the "Mary Rogers" conference (or "compliance conference" or "informal conference" or "opportunity to show compliance conference", however it may be designated by a particular entity) required by the Court of Appeals in Rogers v State Board of Cosmetology, 68 Mich App 751 (1976). The appeal you describe would appear to fall within the above exemption; whether or not the exemption applies earlier is not being answered at this time, but will be discussed on a case by case basis.

Your second question concerns "picketing of the state offices or legislature." Such picketing has consistently been viewed by the Courts as symbolic speech and the Department will do nothing to require reporting or limit it unless it falls clearly within the activities captured by the statutory definition of

"lobbying." That is, the only time picketing will be considered lobbying is when it constitutes "communicating directly with an official in the executive branch . . . or . . . the legislative branch of state government for the purpose of influencing legislative or administrative action . . . . " The phrase "to influence legislation" was defined in New Jersey State Chamber of Commerce v N.J. Election Law Enforcement Commission, 82 NJ 57, 79; 411 A 2d 168 (1980) (quoted with approval in Pletz v SOS, 125 Mich App at 350):

> "Accordingly, we conclude that the meaning to be ascribed to this terminology is activity which consists of direct, express and intentional communications with legislators undertaken on a substantial basis by individuals acting jointly for the specific purpose of seeking to affect the introduction, passage, or defeat of, or to affect the content of legislative proposals."

In short, only when picketing falls within this narrowly defined area will it constitute lobbying and be subject to the Act.

Because you failed to specifically describe the nature of the "picketing of the state offices and legislature" about which you inquired, it is difficult to be more specific. You indicated in a telephone conversation that the type of picketing you have in mind includes picketing to support or oppose specific legislation or more general topics and that the picketing may be done either by paid employees or volunteers or a combination, may be directed at a group (i.e., the legislature, one house or a committee) or at an individual and may take the form of (for example) a march in front of the Capitol. Based upon this general description it is difficult to conceive of any way those types of picketing could ever fall within the regulatory scheme of the Act. Only when the picketing clearly consists of "communicating directly with an official in the executive branch . . . or . . . legislative branch of state goverment for the purpose of influencing legislative or administrative action," as defined in the Act, will it be caught up in the requirements of the Act.

You should also be advised that even when the activity falls within the purview of the Act, many expenditures are still exempt from the reporting requirments of the Act. For example, travel, food and beverage, and uncompensated, unreimbursed volunteer efforts are all excluded from the Act.

Your final question concerns meetings of public bodies, and you wonder if attendance at such meetings is considered lobbying. Simply monitoring legislation is not lobbying; hence, attending the meeting of a public body to observe the proceedings is not lobbying. However, when a person makes a direct communication intended to influence legislative or administrative action to a group which includes one or more public officials, the compensation paid or received for the time spent in attendance is an expenditure for lobbying or compensation received for lobbying. In other words, not only must the time spent actually speaking be counted, but also the time during which the speaker is in attendance and the public body is discussing the issue which the speaker addressed. For example,

assume you are a lobbyist agent and are compensated to attend a two hour legislative committee meeting. Assume further the committee spends one and a half hours discussing bills you are not interested in and thirty minutes discussing the bill which interests you. If you speak on your bill before the committee during a portion of the thirty minute period, you must report your compensation for thirty minutes.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

17-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

April 6, 1984·

Mr. Conrad L. Mallett, Jr.
Director, Legal and Governmental Affairs
Mr. Brian P. Henry
Assistant Legal Advisor
Office of the Governor
State Capitol Building
Lansing, Michgian 48909

Dear Messrs. Mallet and Henry:

This is in response to your letter raising questions with respect to the application of the lobby act, 1978 PA 472 (the "Act") to the members of the Governor's Commission on Jobs and Economic Development.

The Commission was established by executive order. It has no policymaking or administrative authority. It is a private sector advisory body which reviews the recommendations of the Cabinet Council on Jobs and Economic Development. The members of the Commission are leaders associated with business and labor. Some of the members are associated with entities which have registered as lobbyists pursuant to the Act. You have raised four issues with respect to the Commission and its members which are discussed in the succeeding pages.

> "1. Whether a member of the commission is a 'public official' as that term is defined in MCL 4.416(2);"

The critical element in responding to this issue is the nonpolicymaking, nonadministrative nature of the Commission's activity. The definition of public official is found in section 6(2) of the Act (MCL 4.416), which reads:

> "Sec. 6. (2) 'Public official' means an official in the executive or legislative branch of state goverment."

The definition of "official in the executive branch" of state government set forth in section 5(9) of the Act (MCL 4.415) specifically excludes those who serve "in a clerical, nonpolicymaking, or nonadministrative capacity." The Governor's Commission on Jobs and Economic Development is an advisory body without administrative or policymaking authority. Therefore, membership on the

Commission cannot be construed to make the member a public official pursuant to the Act.

> "2. Whether, if a commission member is a 'public official,' his/her lobbyist employer must include in its periodic reports food or beverage provided to the commission member at the expense of the employer or must refrain from providing the commission member entertainment or other perquisites at the expense of the employer or organization;"

As indicated in the answer to 1 above, it is clear that the members of the Commission are not public officials; thus, food and beverage provided for them are not to be reported under the Act.

> "3. Whether communication between the commission or any of its members and the Governor or public officials in the executive office may be 'lobbying' as that term is defined in MCL 4.415(2);"

As an advisory body the Governor's Commission on Jobs and Economic Development is expected to review the recommendations of the Cabinet Council on Jobs and Economic Development as well as to carry out other advisory functions assigned by the Governor.

Even though the members of the Commission are unpaid they perform advisory functions similar to those of employees in the Office of the Governor. The Department of State has consistently interpreted the Act to exclude communications between employees and public officials for whom they work. Members of the Commission are not lobbying when they are carrying out their duties on the Commission.

> "4. Whether the acquiescence of a commission member's employer or organization to the member's service to the commission during the member's normal working hours comprises compensation of the commission member 'for lobbying' or an expenditure by the employer or organization 'for lobbying.'"

Pursuant to the response to number 3 above compensation received while carrying out the member's Commission duties is not reportable as a lobbying expense even though the organization paying the compensation is a lobbyist. The Commission is not engaged in lobbying when advising the Governor. However, it should be noted that the Commission could become a lobbyist if it compensated or reimbursed its members or others to lobby public officials outside the Office of the Governor.

It should also be borne in mind that Commission members who use the communication opportunities afforded by membership on the Commission to attempt to influence administrative or legislative action on behalf of their employers will trigger the recordkeeping and reporting requirements of the Act if they are com-

pensated or reimbursed in excess of $250.00 for lobbying during a 12 month period.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

18-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

April 18, 1984

Conrad L. Mallett, Jr.
Director, Legal and Governmental Affairs
Brian P. Henry
Assistant Legal Advisor
Office of the Governor
State Capitol
Lansing, Michigan 48909

Dear Messrs. Mallett and Henry:

This is in response to your request for an interpretation of the applicability of the lobby act, 1978 PA 472 (the "Act") to the formation of the Governor's budget.

Michigan in accordance with its Constitution and statutes utilizes a centralized process for the development of an annual budget. Article 5, section 17 of the Michigan Constitution requires the governor to submit a detailed budget to the legislature for each fiscal year. In addition, the governor is required to submit appropriations bills embodying the proposed expenditures along with bills for any additional revenues necessary to cover the proposed expenditures.

MCL 21.1 et seq., the State Budget Act, establishes the office and sets forth the duties of the state budget director. The budget director is required to gather information from the various state departments and establish estimates of the financial needs of the departments as well as revenue estimates. The budget act also gives the budget director the authority to mandate the attendance of state officials at budget hearings convened by the director.

The preparation of the budget entails numerous communications between and among public officials and classified employees of the Office of the Governor, the Department of Management and Budget, and all the other agencies of state government.

In your letter you focus on contacts between classified civil servants and public officials involved in the formulation of the budget. The specific questions are:

"A. Is a classified civil service employee of a state department or a budget analyst for DMB, who communicates directly with the Budget Director for the purpose of influencing a budget recommendation, considered to be 'lobbying?'

B. Is a classified civil service employee of a state department or a budget analyst for DMB, who communicates directly with a department director for the purpose of influencing or justifying a management plan, considered to be 'lobbying?."

The situations identified in your letter involve communications between classified civil servants and public officials. These communications fall into two general categories.

1. Communications between civil servants employed by the Department of Management and Budget and public officials in the Department of Management and Budget.

The Department of State has previously concluded that communications within an agency are not lobbying. This interpretation was based on section 6(1) of the Act (MCL 4.416) which defines the term "person." That definition defines a state agency as a person. The inclusion of intra-agency communications would require an agency to register and report for lobbying itself. It is clear that the legislature did not intend to require agencies to keep records, register or report under the Act for communications that take place within an autonomous state agency.

2. Communications between civil servants employed by one agency and public officials charged with administering a different agency when such communications take place in the context of preparing a management plan or the annual state budget.

The management plan and the budget recommendations are mandated by MCL 21.1 et seq. All state agencies participate in the budgetary process. The budget director is given the responsibility to draw together the necessary information and the authority to draft the budget for presentation to the governor. An agency cannot choose to submit its own budget for legislative consideration.

While a lobbyist or lobbyist agent may find the particular administrative proposals to be important there is no statutory requirement to lobby. Communications between administrative agency personnel made in the course of formulating the Governor's budget are the result of constitutional and statutory mandates and are not lobbying as defined in the Act.

The situations specified in your letter do not involve lobbying pursuant to the Act. The budgetary process set forth in the State Budget Act requires state agencies to participate in the process. It is distinguishable from general language contained in many statutes which directs any agency to propose or review legislation within the agency's statutory jurisdiction.

The principles outlined in this letter are limited to the application of the Act to the state budgetary process.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings & Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

19-84-LI

LANSING

MICHIGAN 48918

April 19, 1984

David LaLumia
Michigan Association of Community
Mental Health Boards
P.O. Box 10081
Lansing, Michigan 48901

Dear Mr. LaLumia:

This is in response to your inquiry concerning applicability of the lobby act (the "Act"), 1978 PA 472, to executive directors of county community mental health boards. Specifically, you ask whether a community mental health (CMH) director is a public official who is exempt from the Act's registration and reporting requirements.

"Lobbying" is defined in section 5(2) of the Act (MCL 4.425) as "communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action."

A board member, employee or any other person who lobbies on behalf of the board is required by sections 5(5) and 7(2) to register as a lobbyist agent upon receiving "compensation or reimbursement of actual expenses, or both, in a combined amount in excess of $250.00 in any 12-month period for lobbying", unless the person is specifically excluded from the Act's registration and reporting requirements.

Persons who are exempt from the Act are identified in section 5(7), which provides in relevant part:

> "Sec. 5. (7) Lobbyist or lobbyist agent does not include:
>
> (b) All elected or appointed public officials of state or local government who are acting in the course or scope of the office for no compensation, other than that provided by law for the office.
>
> (c) For the purposes of this act, subdivision (b) shall not include:

(ii) Employees of townships, villages, cities, counties or school boards."

A CMH board is established under the authority of the Mental Health Code, 1974 PA 258, as amended. Each board appoints an executive director whose terms and conditions of employment "including tenure of service, shall be mutually agreed to by the board and the county director and shall be specified in writing." You indicate that unlike other CMH staff, the director of the board is generally not considered to be a county employee. Therefore, you suggest that a CMH director is not brought back into the Act by section 5(7)(c)(ii), but rather is an appointed public official of local government who is exempt from the Act pursuant to section 5(7)(b).

In the attached letters to Mr. Don M. Schmidt and Mr. Kenneth F. Light, dated January 13, 1984, and January 24, 1984, respectively, the Department indicated the exemption found in section 5(7)(b) applies only to elected or appointed officials who serve in autonomous, policymaking capacities. As stated in a December 7, 1983, letter to Senator Ed Fredricks, a person serves in a policymaking capacity if the person's responsibilities are of broad scope and not clearly defined. On the other hand, an individual who operates at the direction or control of another or within specified boundaries does not serve in a policymaking position and is not a public official for purposes of the Act.

The Mental Health Code indicates that a CMH director is not responsible for a broad range of duties but operates within boundaries specified by the CMH board. That is, the director's responsibilities are limited to administering the program and policies established by the CMH board. Thus, a CMH director does not serve in an autonomous, policymaking capacity and does not qualify for the public official exemption found in section 5(7)(b). The director must therefore register as a lobbyist agent upon receiving more than $250 in a 12 month period for lobbying.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

20-84-LI

April 19, 1984

Paul E. Bolek
Administrative Counsel
North American Benefit Association
P.O. Box 5020
Port Huron, Michigan 48061

Dear Mr. Bolek:

This is in response to your inquiry concerning applicability of the lobby act (the "Act"), 1978 PA 472, to communications with administrative agencies. The specific facts and questions you raise are set out and answered below.

> 1. "A written communication may sometimes be addressed to the administrative agency, such as the Insurance Bureau, without being directed to any specific person. Can such a communication ever constitute lobbying?"

The Department is unable to provide a specific answer to this question without additional information. However, the following discussion is provided for your guidance.

"Lobbying" is defined in section 5(2) of the Act (MCL 4.415) as "communicating directly with an official in the executive branch of state government . . . for the purpose of influencing . . . administrative action." Pursuant to section 5(9), "official in the executive branch" includes elected state officeholders, members of state boards and commissions, and unclassified employees who serve in policymaking capacities. Sections 2(1) and 6(3) of the Act (MCL 4.412 and 4.416) taken together indicate that "administrative action" is any action requiring the exercise of personal judgment.

Generally, a written communication is lobbying only if the purpose of the communication is to influence administrative action and the communication is addressed to a specific public official or group which includes public officials.

> 2. "Administrative agencies will invite comments regarding a proposed rule. Will a response thereto constitute lobbying?"

As previously indicated, lobbying includes any communication with an official in the executive branch for the purpose of influencing administrative action. The Act makes no distinction between communications which are in response to an invitation or request for information and those which are initiated by the communicator.

"Administrative action" is defined specifically in section 2(1) as the "proposal, drafting, development, consideration, amendment, enactment, or defeat of a nonministerial action or rule by an executive agency or an official in the executive branch of state government." (emphasis added) Thus, a person who responds to an agency's request for comments on a proposed rule is lobbying if 1) the response attempts to influence the agency's action on the rule or the rule's content, and 2) the response is directed towards a public official or a group, such as a hearing panel, which includes an official.

> 3. "Regulatory action and policy results from statutory mandate and authority as well as various court decisions. It is only natural that opinions differ as to the proper legal interpretation of a statute or court ruling. Would a communication with a public official in an administrative agency, such as the Insurance Bureau, discussing what the proper legal interpretation of the law or ruling is, constitute lobbying?"

Communications with an official in the executive branch which are for the purpose of influencing an agency's interpretation of a statute or court ruling generally are lobbying. However, section 2(1) of the Act indicates that persons who attempt to influence administrative action which is reached by means of a "quasi-judicial determination" are not lobbying. Therefore, communications concerning the proper construction of a statute or decision which occur in the course of an administrative hearing or other quasi-judicial proceeding are exempt from the Act's reporting requirements.

> 4. "Insurers are required by law to make a number of filings with the Insurance Bureau. I presume that under normal circumstances, this would not be considered lobbying."

In order to lobby an administrative agency, there must be an attempt to influence administrative action by directly communicating with an official in the executive branch. As indicated earlier, administrative action includes only nonministerial decisions. Thus, pursuant to sections 2(1) and 6(3), attempts to influence actions which are performed "in a prescribed manner under prescribed circumstances in obedience to the mandate of legal authority, without the exercise of personal judgment regarding whether to take the action" are not lobbying. Filing documents with the Insurance Bureau may or may not be lobbying. However, your question is too indefinite to provide a specific answer.

> 5. "Insurance agents are required by law to be licensed by the

Insurance Bureau. Can this application procedure ever become lobbying?"

Pursuant to Chapter 12 of the Insurance Code of 1956, 1956 PA 218, as amended (MCL 500.1200 et seq.), an insurance agent cannot be refused a license without a hearing. Section 91 of the Administrative Procedures Act, 1969 PA 306, as amended (MCL 24.291) provides that a licensing determination which is preceded by notice and an opportunity for hearing is a contested case and therefore governed by formal administrative hearing requirements. While the parameters of the quasi-judicial exemption discussed in the response to question 3 have not been determined, it is clear that decisions in contested cases are the result of "quasi-judicial determinations authorized by law." As such, decisions relating to an insurance agent license application are exempt from the definition of "administrative action" found in section 2(1), and communications relating to the decision are not lobbying.

6. "An insured may forward a complaint to the Insurance Bureau or other administrative agency. The agency then may require the insurer to explain its position regarding the matter. Would the response to the agency's request be considered lobbying."

Again, this question is too indefinite to provide a specific answer. Additional facts are needed to determine whether the response is lobbying.

7. "Most businesses do not hire professional lobbyists. However, an employee may be required to make a communication which meets the definition of lobbying. If such an employee is paid on a salary basis and no additional compensation is provided for the lobbying activity, must any portion of the employee's salary be considered in determining whether said employee or the employer have met the monetary threshold amounts established by the Act."

"Lobbyist" and lobbyist agent" are defined in section 5(4) and (5) as follows:

"Sec. 5. (4) 'Lobbyist' means any of the following:
(a) A person whose expenditures for lobbying are more than $1,000.00 in value in any 12-month period.
(b) A person whose expenditures for lobbying are more than $250.00 in value in any 12-month period, if the amount is expended on lobbying a single public official.

* * *

(5) 'Lobbyist agent' means a person who receives compensation or reimbursement of actual expenses, or both, in a combined amount in excess of $250.00 in any 12-month period for lobbying."

The $1,000 and $250 thresholds are calculated pursuant to rules 21 and 22, 1981 AACS R4.421 and R4.422. These rules state:

"Rule 21. For the purpose of determining whether a person's expenditures for lobbying are more than $1,000.00 in value in any 12-month period, or are more than $250.00 in value in any 12-month period if expended on lobbying a single public official, the following expenditures shall be combined:

(a) Expenditures made on behalf of a public official for the purpose of influencing legislative or administrative action.

(b) Expenditures, other than travel expenses, incurred at the request or suggestion of a lobbyist agent or member of a lobbyist, or furnished for the assistance or use of a lobbyist agent or member of a lobbyist while engaged in lobbying.

(c) The compensation paid or payable to lobbyist agents, employees of the lobbyist, and members of a lobbyist for that portion of their time devoted to lobbying.

Rule 22. For the purpose of determining whether a person receives compensation or reimbursement for actual expenses, or both, in a combined amount in excess of $250.00 in any 12-month period for lobbying, the following compensation and reimbursement shall be combined:

(a) Reimbursement for expenditures made on behalf of a public official for the purpose of influencing legislative or administrative action.

(b) Reimbursement for expenditures, other than travel expenses, made to influence legislative or administrative action.

(c) Compensation received for that portion of time devoted to lobbying." (emphasis added)

The above-quoted provisions indicate that compensation paid to an employee for lobbying must be included when calculating the thresholds established in section 5, even though the employee is hired on a salary basis to perform duties other than lobbying. If the employee receives more than $250 in a 12 month period for time devoted to lobbying, the employee must register as a lobbyist agent. Assuming no other lobbying expenditures are made, the employer is required to register as a lobbyist if the $250 paid to the employee is for lobbying a single public official, or if in any 12 month period the employee is paid more than $1,000 for time spent lobbying.

8. "This question is predicated on an affirmative answer to number 6 (sic). A business may belong to a trade organization. As a member, its employee may engage in lobbying activity on behalf of the trade organization. If no compensation is received for the lobbying activity, but it is done on the member-employer's time, must any of the employee's salary be considered in relation to the threshold amounts."

Section 5(7) of the Act exempts certain persons from the definitions of "lobbyist" and "lobbyist agent." Specifically, section 5(7)(d) provides:

"Sec. 5. (7) Lobbyist or lobbyist agent does not include:

(d) A member of a lobbyist, if the lobbyist is a membership organization or association, and if the member of a lobbyist does not separately qualify as a lobbyist under subsection (4)."

If the trade organization in your example is a lobbyist, section 5(7)(d) indicates the member-employer does not become a lobbyist or lobbyist agent unless the employer separately qualifies as a lobbyist. In order to qualify as a lobbyist under section 5(4), the employer must make expenditures of more than $1,000 in a 12 month period for lobbying or more than $250 on lobbying a single public official. As indicated in the response to question 7 (and not to question 6), the salary paid to an employee for time devoted to lobbying is an expenditure for lobbying. Therefore, the exemption found in section 5(7)(d) does not apply, and compensation paid for that portion of the member-employer's time devoted to lobbying must be counted towards the Act's thresholds.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

6-84-LD

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

April 24, 1984

Donald J. Pizzimenti
Vice President-Community
and Governmental Affairs
Detroit Edison
2000 Second Avenue
Detroit, Michigan

Dear Mr. Pizzimenti:

This is in response to your request for a declaratory ruling regarding the applicability of the lobby act (the "Act"), 1978 PA 472, to Detroit Edison's support of charitable organizations.

You indicate Detroit Edison Company ("Edison") is registered as a lobbyist. Edison encourages its employees to donate personal services to charitable organizations in the community and permits them to work for the charitable organizations on company time. Occasionally, Edison employees will lobby on behalf of the charitable organizations resulting in Edison paying employee wages for lobbying. Your question, edited to specifically apply to Edison, is:

> "When an employee of Edison, a registered lobbyist, is also a member of a 501(c)(3) charitable organization and lobbies on behalf of the 501(c)(3) organization on Edison's time, but such lobbying does not result in any direct financial benefit to Edison's business, is that lobbying activity exempt from the requirements of the Act?"

Attached is a February 3, 1984, letter to Mr. Joseph P. Bianco, Jr., which addresses your question. To summarize that answer, Edison is not required to report the employee's wages, cost of support staff, copying or postage costs, etc. under the facts you have provided. However, if Edison reimburses an employee for purchasing food or beverage for a public official, that expense must be reported regardless of the reason the food or beverage was purchased.

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

21-84-LI

LANSING

MICHIGAN 48918

April 24, 1984

John Thodis
Michigan Manufacturers Association
124 E. Kalamazoo Street
Lansing, Michigan 48933

Dear Mr. Thodis:

This is in response to your request for an interpretation of the lobby act (the "Act"), 1978 PA 472. Specifically, you indicate you have registered as a lobbyist agent for Michigan Manufacturers Association. You also are a member of several boards or commissions which compensate or reimburse you for lobbying. You ask whether you are required to file separate registration forms upon receiving more than $250 in compensation or reimbursement for lobbying from the boards and commissions.

"Lobbyist agent" is defined in section 5(5) of the Act (MCL 4.415) as "a person who receives compensation or reimbursement of actual expenses, or both, in a combined amount in excess of $250.00 in any 12-month period for lobbying." The $250 threshold is calculated pursuant to rule 22, 1981 AACS R4.422, which states:

> "Rule 22. For the purpose of determining whether a person receives compensation or reimbursement for actual expenses, or both, in a combined amount in excess of $250.00 in any 12-month period for lobbying, the following compensation and reimbursement shall be combined:
> (a) Reimbursement for expenditures made on behalf of a public official for the purpose of influencing legislative or administrative action.
> (b) Reimbursement for expenditures, other than travel expenses, made to influence legislative or administrative action.
> (c) Compensation received for that portion of time devoted to lobbying."

This rule indicates that compensation or reimbursement received from any source must be combined to determine whether the $250 threshold has been met. The rule does not allow a potential lobbyist agent to make separate calculations for each person who pays or reimburses the agent for lobbying. Thus, rule 22 suggests

that a person who qualifies as a lobbyist agent is required to file a single registration form, regardless of the number of persons who compensate or reimburse the agent for lobbying.

The legislative intent expressed in section 7(2) of the Act (MCL 4.417) further indicates that a lobbyist agent is required to register only once. Section 7(2) originally was enacted to read as follows:

> "Sec. 7 (2) Not later than 3 days after becoming a lobbyist agent, a lobbyist agent shall file a registration form with the secretary of state. The registration form shall contain the following information:
> (a) The name and office address of the lobbyist agent, if the lobbyist agent is not an individual.
> (b) The name, permanent residence address, and office address of the lobbyist agent, if the lobbyist agent is an individual.
> (c) The name and address of each person employed, reimbursed for expenses which exceed $10.00, or compensated by the lobbyist agent for lobbying in this state.
> (d) The name, address, and nature of business of a person who gives compensation to or reimburses the lobbyist agent or the representative of a lobbyist agent for lobbying."

In Pletz v Secretary of State, 125 Mich App 335 (1983), the Court of Appeals held that subsection (d) of this section unconstitutionally infringed upon a lobbyist agent's free association rights. While striking down this subsection, the Court noted:

> "With this result, registrants would have to abide by the registration requirements of the act but would not have to reveal the names, addresses, and business information about persons (which, under the definitions of the act, includes partnerships, businesses and individuals) who give compensation to or reimburse lobbyist or lobbyist agents. . . . (W)e believe that this holding of unconstitutionality is separate from the act as a whole." 125 Mich App at 364.

Section 7(2), read as a whole, clearly indicates the legislature intended a lobbyist agent to file one registration form. The fact that the agent received compensation or reimbursement for lobbying from more than one source have been disclosed on the face of the document.

Although section 7(2)(d) has been declared invalid, it is still possible to identify those persons who compensate or reimburse a particular lobbyist agent for lobbying. Section 7(1)(b) requires lobbyists to disclose the identity of each person employed, reimbursed or compensated for lobbying. Therefore, the disclosure promoted by section 7(2)(d) remains available.

As the Court of Appeals explained, the determination that section 7(2)(d) is unconstitutional has no effect upon the Act's registration and reporting

requirements. Thus, in answer to your question, a person who is registered as a lobbyist agent is not required to file a separate registration form upon receiving more than $250 in compensation or reimbursement for lobbying from another source.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

April 25, 1984

The Honorable John F. Kelly
State Capitol Building
P.O. Box 30036
Lansing, Michigan 48909

Dear Senator Kelly:

This is in response to your request for an interpretive statement regarding the applicability of the lobby act (the "Act"), 1978 PA 472, to a number of hypothetical situations involving attorneys.

Before addressing your individual inquiries, it is noted that your hypotheticals, one way or another, all seem to relate to the "practice of law" and the impact of the Act upon those who engage in the law business in Michigan. That being the case, a few initial comments are in order concerning the extent to which the Act was designed to govern the practice of law.

The Act, in its title, affords significant guidance with regard to the legislative intent and purpose on this point. The title indicates that the Act is designed to regulate lobbying activities, lobbyists, and lobbyist agents and to require registration and reporting from lobbyists and their agents. No mention is made of attorneys or the regulation of their law practices. Moreover, the body of the Act makes no mention of lawyers, attorneys, legal counsel, or the practice of law. There is an indication in section 2(1) of the Act (MCL 4.412) that activities which occur in the context of quasi-judicial determinations do not fall within the Act's purview, but this is the only instance where the Legislature may have had lawyers specifically in mind. From all this, there appears a legislative intent to refrain from regulating attorneys per se and a corresponding intent to treat attorneys on the same footing as other citizens engaged in lobbying.

This conclusion is buttressed by the recent decision of the Michigan Court of Appeals in Pletz v Secretary of State, 125 Mich App 335 (1983). In

holding that the Act does not violate the title-body, one-object doctrine of the state constitution (Const 1963, art 4, §24), the Court held:

> "Likewise, we do not find that the act attempts to regulate the practice of law. The act treats attorneys who lobby in an identical manner as non-lawyers, except the act, in §2(1), specifically does not govern attorneys' communications with officials in administrative agencies. Attorneys whose activities relate to the practice of law, for example involvement in a quasi-judicial determination (administrative law), do not fall under the ambit of the act." 125 Mich App 335, 348

During the proceedings which led to the issuance of the Court of Appeals decision, the Secretary of State was called upon to explain how he intended to interpret and enforce the Act. With regard to the practice of law question, Secretary of State Austin submitted an affidavit which indicated in relevant part that:

> "I interpret the 1978 lobbying law as follows, and will administer, and enforce this law consistent with these interpretations:
>
> * * *
>
> "5. The 1978 Lobbying Law does not intrude into the 'practice of law' or to 'engage in the law business', for which a person must be regularly licensed and authorized to practice law in Michigan."

As you may know, following the submission of the above-described affidavit, certain practitioners concluded that a broad exclusion or "exemption by interpretation" for attorneys had been added to the Act by the Secretary of State. In the interests of clarity, it must be indicated that that was neither the intent nor the case. The Secretary of State has an ongoing obligation to interpret all laws under his enforcement jurisdiction in a constitutional manner. During the litigation, the Secretary of State recognized the potential for debate with regard to activities commonly viewed within the traditional concept of the practice of law on the one hand and the emerging legal concept of "lobbying" under the Act on the other. Thus, through the affidavit, there was official acknowledgment of those situations where a person might be engaged in an activity which only a lawyer could perform and was therefore outside the scope of the Act, but which might otherwise be considered lobbying. It is expected that such situations will be few in number. However, as is noted later in this document, your inquiry does touch upon certain of these circumstances.

Your hypotheticals and questions are set out and answered below.

> "1. An attorney conducts legal research and prepares a memorandum of law and legal opinion for his or her client for the purpose of attaching the memorandum to a letter from the client, a trade union executive, to a legislator opposing action on legislation. Clearly the lawyer's activities involved providing analysis in connection with a communication with a public official that would not have been incurred but for the activity of communicating directly. The question is whether the expenditure for the lawyer's effort must be reported as a lobbying expenditure, and if so, whether the lawyer, having received more than $250, must register as a lobbyist agent notwithstanding that the lawyer did not engage in the direct communication personally?"

In order to answer your initial inquiry, certain statutory and other definitions pertaining to the meaning of the term "lobbying expenditure" must be noted. The term "lobbying" is defined in section 5(2) of the Act (MCL 4.415) as ". . . communicating directly with . . . an official in the legislative branch of state government for the purpose of influencing legislative . . . action." Section 5(3) of the Act (MCL 4.415) indicates in relevant part that "influencing" connotes ". . opposing . . . by any means, including the providing of or use of information, statistics, studies, or analysis." Section 3(2) of the Act (MCL 4.413) states that "expenditure" includes "compensation for labor". Further, rule 1(1)(d)(iv) of the administrative rules promulgated to implement the Act (1981 AACS, R 4.411) indicates that "expenditures for lobbying" include an "expediture for providing or using information, statistics, studies, or analysis in communicating directly with an official that would not have been incurred but for the activity of communicating directly."

In your hypothetical, you state that an attorney has conducted legal research and has prepared a "memorandum of law and legal opinion" which will be conveyed to a legislator by a trade union executive and you ask whether the payment for this effort must be reported as a lobbying expenditure. Based on the definitions just set forth, it would appear that the payment for the "memorandum" is in fact a lobbying expenditure since the memorandum was prepared to be a part of the executive's direct communication. Section 8(1) of the Act (MCL 4.418) requires the filing of periodic reports which disclose by category all expenditures made or incurred by a lobbyist or lobbyist agent. Thus, the expenditure must be reported, but it is reportable by the person who made it, not the person who received the payment. It is the payor executive who reports the expenditure. The lawyer reports nothing.

You also ask whether the lawyer is required to register under the Act by virtue of having received more than $250.00? That query is answered in the negative. Sections 5(5) and 7(2) of the Act (MCL 4.415 and 4.417) require

lobbyist agent registration only when an agent has received $250.00 or more in any 12-month period for lobbying, as opposed to assisting lobbying. As noted above, lobbying entails direct communication with a public official. The lawyer need not register because he or she is not communicating directly. That is, the attorney did not mail the memorandum to the legislator. To the contrary, the lawyer provided the document only to the union official. What happens from that point relative to use and reporting is up to the union executive. In this case then, because there has been no direct attorney/legislator contact, there is no requirement for the lawyer to register.

> "2. In connection with rules proposed by a state agency pursuant to the Administrative Procedures Act ('APA'), a lawyer prepares an analysis of the rules and gives his or her legal opinion as to whether the rules are consistent with the underlying statute, constitutional requirements and other legal requirements. The lawyer's document outlines the legal problems facing persons required to comply with the rules. The analysis is prepared for the dual purpose of advising the lawyer's client and preparing the lawyer to attend a public hearing on the proposed rules. At the request of the lawyer's client, the lawyer attends the public hearing on the proposed rules, and as an attorney for the client, presents the views of the organization as the legal advocate of the client. Because the client is not trained in law, the client has asked the licensed attorney to represent the views of the client with respect to both legal issues and policy issues involved in consideration of the rules. Assuming the legal fees exceed $250, must the lawyer register as a lobbyist agent and, if so, what aspects of the lawyers services must be reported?"

At the outset, the facts of your hypothetical must be expanded somewhat in order to answer it properly. Under the definitions provided in the Act, it must be recalled that there can be no lobbying unless there is direct communication with an official in the legislative or executive branch of state government. Thus, if no public official is on the panel holding the public hearing, there is no direct communication with a public official and consequently there can be no lobbying. In many and perhaps most state departments, public hearings concerning proposed rules are conducted by civil servants rather than by public officials. Representation of a client's views to civil servants will not give rise to any obligation on the part of lawyers to register or report under the Act.

Assuming the panel does include at least one public official, the attorney, when addressing the entire panel relative to both policy and legal issues, is definitely lobbying since at that point in time he or she is attempting to influence administrative action. Section 2(1) of the Act (MCL 4.412)

indicates that administrative action means, among other things, "the proposal, drafting, development, consideration, amendment, enactment or defeat of a . . . rule by an executive agency or an official in the executive branch of state government." The fees received for participation at the rules hearing count toward the attorney's $250.00 lobbyist agent threshold. Once the threshold is passed, the attorney is under an obligation to register as a lobbyist agent and to report compensation or reimbursement received for lobbying, money spent on food and beverage for public officials, etc.

Preparation of an analysis of the rules may or may not be lobbying depending on several factors. Again, if there will be no direct communication because no public official is on the panel, this preparation cannot be lobbying. Assuming there is a potential for lobbying (for example, the hearing is before the Natural Resources Commission), then the purpose of preparing the analysis is important. If the client has not decided whether to lobby for or against the rules prior to requesting the legal analysis, the analysis is being prepared for purposes other than lobbying, for instance, to assist the client in deciding whether to lobby. In other words, preparation of the legal analysis may not meet the "but for" test mentioned in question 1. The legal fee for the analysis would not be reported by the client or the lawyer. If, after reading the legal analysis, the client decides to oppose or support the rules and mails or gives the analysis to a public official who will decide whether to change or approve the rules, the cost of retyping or copying the analysis (including the wages of the typist or copy machine operator) are expenditures for lobbying which must be reported by the client. The legal fees are still not reportable.

On the other hand, assume the client reads the proposed rules, decides they are unacceptable and should be opposed, engages the attorney to analyze the rules "for the dual purpose of advising the lawyer's client and preparing the lawyer to attend the public hearing on the rules", and has the attorney attend the public hearing and directly communicate with a public official. This example meets the "but for" test. The attorney's fee for the analysis is an expenditure for lobbying by the client (the lobbyist) and compensation received for lobbying by the attorney (the lobbyist agent). The client must report this fee. If the attorney has not previously registered as a lobbyist agent, the attorney must now register because the fee is in excess of $250.00.

> "3. The Department of Social Services denies a medicaid payment to an indigent hospital patient. An attorney is retained by the family of the indigent patient who calls the Department Director and asks her to intervene in the matter and to reverse the decision of Department employees. In preparation for contacting the Director, the lawyer spends two hours, for which he charges the family of the patient $130 per hour, reviewing medicaid rules and statutes relative to the power of the Director of Social Services to intervene. Over a three-week period, the attorney spends two hours discussing the

> matter with the Director of Social Services. Must the lawyer register as a lobbyist agent on behalf of the family of the indigent patient and must the family members paying for the lawyer's services register as lobbyists?"

Section 5(2) of the Act (MCL 4.415) includes within the definition of lobbying all direct communications with an official in the executive branch of state government intended to influence "administrative action". Administrative action is a term defined in section 2(1) of the Act (MCL 4.415) as follows:

> "(1) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment of a nonministerial action or rule by an executive agency or an official in the executive branch of state government."

The section goes on to state that administrative actions do not include quasi-judicial determinations authorized by law.

In order to fully understand the meaning of the term administrative action, it is necessary to review at least one additional definition found in the Act. Section 6(3) of the Act (MCL 4.416) indicates that:

> "(3) 'Nonministerial action' means an action other than an action which a person performs in a prescribed manner under prescribed circumstances in obedience to the mandate of legal authority, without the exercise of personal judgment regarding whether to take the action."

By reading these definitions together, it becomes apparent that the types of executive actions which may be influenced by reportable lobbying are activities such as policy making and programmatic administrative decisions not mandated by law, whereas attempting to influence other activities which may be described as ministerial in nature will not give rise to reporting obligations under the Act.

In your hypothetical number 3, you indicated firstly, that the Department of Social Services (DSS) denied a medicaid payment to an indigent hospital patient and secondly, that an attorney requested the DSS director to intervene. Thus, your initial inquiry is whether such intervention constitutes administrative action.

On that point, section 105 of the Social Welfare Act (MCL 400.105) provides as follows:

> "The state department (of social services) shall establish and administer a program for medical assistance for the medically indigent under title XIX of the federal social security act, as amended, and shall be responsible for determining eligibility under this act."

This section, on its face, requires DSS (and its director) to do a prescribed activity (make eligibility determinations) in a prescribed manner (under title XIX of the federal social security act) under prescribed circumstances (of medical indigency) without the exercise of personal judgment (i.e. the law must be followed). That being the case, the attorney in your hypothetical was actually attempting to influence the performance of a ministerial duty, rather than an administrative action, and therefore neither the lawyer nor the family members need register under the Act.

Now, the Secretary of State recognizes that it is the proper function of the Director of Social Services, and in some instances the Attorney General, to interpret, administer, and enforce the social welfare laws of Michigan. Those individuals, rather than this agency, have the expertise and experience to do so. It is possible that one or both of them might have a different view from the one stated above and to the contrary conclude that the attorney in question was in fact attempting to influence discretionary matters. In that event, the "attorney" exemption noted in section 2(1) of the Act becomes relevant.

Section 2(1) indicates, among other things, that whenever an attorney attempts to affect a "quasi-judicial determination as authorized by law", the attorney is not influencing administrative action, nor is the attorney lobbying. As noted by the Court of Appeals in Pletz:

> "The design of this exemption is to remove from the act's coverage communications made and activities undertaken by attorneys during the course of contested administrative matters." 125 Mich App 351

The Court also stated:

> "We consider that the exemption removes contested matters before administrative officers, such as referees, hearing officers and commissioners, from the scope of the lobby law." 125 Mich App 352

Under the facts of your hypothetical, it would seem that if the "indigent hospital patient" in actuality had a grievance requiring resolution by DSS, the quasi-judicial process could have been instituted and the quasi-judicial exemption invoked. Section 9 of the Social Welfare Act (MCL 400.9) specifically allows individuals who are dissatisfied with the amount of their federally-funded assistance to institute contested case proceedings.

Moreover, under this set of circumstances, the appeal need not necessarily be resolved by means of an administrative hearing. Section 78 of the APA (MCL 24.278) provides for the disposition of contested cases by stipulation, agreed settlement, consent order, or other mutually acceptable methods. Thus, the attorney could conduct negotiations with the DSS Director without the necessity of registering under the Act.

Finally, it is noted that in your hypothetical, the attorney in question was hired to act as the legal representative of the indigent hospital patient. In that regard, the attorney conducted two hours' of legal research at a cost of $260.00 and performed two hours' of negotiations for a total billing of $520.00. An unstated but implied question from your correspondence is whether this activity constitutes the "practice of law" and if so, whether the fees received by the attorney must still be reported either by the lawyer or the indigent's family.

Michigan courts have long grappled with the meaning of the concept of "practice of law" and have met with only limited success. In fact, in State Bar v Cramer, 399 Mich 116 (1976), the Supreme Court said:

> "We are still of the mind that any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure 'for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order'." Cramer, 399 Mich at 133

However, the fact that one all-encompassing definition may remain an ever elusive goal does not necessarily mean that a working definition is unobtainable for Lobby Act purposes. Indeed, the State Bar has already issued an Informal Ethics Opinion (CI-985, December 31, 1983) concerning some of the interrelationships between the Act and the practice of law. Among other things, this opinion indicates that it would be unethical for a law firm "to employ a non-lawyer to do that which has been called 'lobbying' for the law firm's clients."

Although this issue is relatively new to Michigan, the matter of the interworking of a lobby law and the practice of law has been addressed in other jurisdictions. In the case of Baron v City of Los Angeles, 469 P2d 353 (1970), a California Court reasoned that while in a pragmatic sense the practice of law encompasses all of the activities performed by attorneys in a representative capacity (including legislative advocacy), for lobby law purposes the practice of law occurs only if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind. The Court went on to hold that the lobbying ordinance under discussion did not apply to attorneys when:

> ". . . 'acting on behalf of others in the performance of a duty or service, which duty or service lawfully can be performed for such other only by an attorney licensed to practice law in the State of California." 469 P2d at 358

The Court went on to state:

> "For illustrative purposes, we indicate that an attorney representing a client before a city board or commission which is holding a hearing to reach a quasi-judicial decision on a matter involving factual and legal questions need not register under the ordinance; on the other hand, an attorney authorized by a client to appear at hearings considering local legislation in order to argue for or against the adoption of that legislation would be within the legitimate thrust of the (lobbyist) ordinance." 469 P2d at 359

The rule set out in the Baron case would seem appropriate for implementation in the context of Michigan's Lobby Act. That is to say, where an attorney is engaged in an activity which only an attorney licensed in Michigan can perform, then the Act will not require the attorney to register with regard to that activity.

At the risk of invading the province of the Michigan State Bar and recognizing fully that it is the proper function of the State Bar to make determinations as to what does and does not constitute the unauthorized pratice of law, it would appear that the attorney in hypothetical 3, who was attempting the safeguard the legal rights of an individual, was engaged in the practice of law such that neither the attorney nor the family is required to register or report under the Act.

> "4. An indigent patient in a nursing home has been subjected to possible abuse and mistreatment. The family of the patient hires an attorney to attempt to correct the situation. In investigating the matter, the attorney discovers that the problem may be caused by the failure of the Department of Public Health to properly regulate the facility and that there might be possible corrupt conduct between the nursing home adminstrator and a Department official. The attorney meets with the patient and the patient's family in a confidential meeting pursuant to the attorney/client privilege. The attorney agrees to meet with the Director of Public Health and urge the Director to conduct an investigation and agrees not to reveal the name of the patient or the family paying for the attorney because of the fear for the personal safety of the patient. The lawyer is paid more than $1,000 for communicating directly with the Director of Public Health and the unclassified deputies in the Department urging an investigation. In addition, the lawyer talks with an unclassified member of the Governor's staff and with the Attorney General to urge action to prevent the corrupt conduct in the department. Must the family register as a lobbyist and list the lawyer as having received fees for lobbying?"

In order to respond to your fourth hypothetical, it is once again necessary to refer to the definitions found in the Act concerning administrative action. Those definitions clearly indicate that whenever an individual communicates with a public official to affect a ministerial action, as opposed to an administrative action, there will be no lobbying as that term is used in the Act.

Your hypothetical states that the attorney in question is paid more than $1,000 for communicating directly with the director of the Department of Public Health (DPH) and certain unclassified deputies urging an investigation. If conducting an investigation is an administrative action, then of course there may be reason to believe that reportable lobbying is taking place. However, although it is generally acknowledged that administrators with law enforcement responsibilities have discretion to decide whether or not to institute investigations, your hypothetical seems to suggest that the basic "problem may be caused by the failure of DPH to properly regulate the facility . . . ." That is, although the attorney is on one level requesting an investigation, he or she really seems to be asking DPH to properly enforce the law.

There is recent case law in Michigan which tends to suggest that law enforcement officials, executives, and administrators do not have the discretion to refrain from enforcing valid laws. For example, in Young v City of Ann Arbor, 119 Mich App 512 (1982), the Court of Appeals ruled:

> "As chief of police this defendant was responsible for overseeing and enforcing all policies and practices in the Ann Arbor (Police Station jail) facility. His testimony at trial indicated that he did not require his staff to enforce the pertinent department (of Corrections) regulations. Since we find that the Ann Arbor facility was required to follow the department's rules, it was incumbent upon defendant Krasny to enforce the regulations. This was a ministerial duty of his office . . . ." 119 Mich App at 519

In your hypothetical, the attorney is really doing no more than asking the DPH director to properly enforce the law. Since the proper enforcement of law is a ministerial act or duty, the attorney in question has not engaged in lobbying. Thus, the family need not register as a lobbyist.

In inquiry 4, you also indicated that the attorney spoke with the Attorney General (AG) and with an unclassified member of the Governor's staff to urge action to prevent corrupt practices in DPH. However, while you specifically mentioned that the lawyer was paid to contact DPH staff, you did not assert any payment to the attorney for contacting the AG and the Governor's representative.

Section 5(5) of the Act (MCL 4.415) provides that a lobbyist agent means a person who receives compensation in excess of $250 in any 12-month period for lobbying. Under your scenario, the attorney did not receive any compen-

sation to contact the AG and the Governor's office. It is noted that attorneys licensed to practice in Michigan are "officers of the court". Thus, the lawyer's voluntary action in communicating with the above-named public officials does not give rise to reporting obligations under the Act.

> "5. In 1982, the Michigan Legislature passed a law to encourage alien, i.e. non-United States, insurance companies to be licensed in the State of Michigan as an economic development and job creation program. In-house counsel and a Michigan attorney representing a French insurance company meet with the Insurance Commissioner to discuss procedures for handling an application to be licensed under the new law. In addition, the lawyers, as counsel for the French company, meet with the Director of the Department of Commerce and with unclassified members of the Governor's staff, to discuss possible state programs which would provide economic incentives to the foreign company locating its U.S. subsidiary to the State of Michigan. Both the in-house counsel and the Michigan attorney are paid in excess of $1,000 for the meetings with public officials during a one-week visit to Michigan. Must the French in-house counsel register within three days as a lobbyist agent for the French company? Must the Michigan attorney register within three days of the visit as a lobbyist agent or may he or she wait until three days after receiving the fees for the legal services before registering as a lobbyist agent of the French company?"

In hypothetical number 5, you have posited that a Michigan attorney and out-of-state counsel for a French corporation meet with the Insurance Commissioner "to discuss procedures for handling an application to be licensed" in Michigan as an insurance company and you also hypothesize that both lawyers meet with unclassified officials in both the Commerce Department and the Governor's Office "to discuss possible state programs which would provide economic incentives to the foreign company" to locate in Michigan.

Again, section 2(1) of the Act (MCL 4.412) indicates that lobbying occurs vis a vis the executive branch only when an individual is attempting to influence some form of administrative action. Under the facts of the hypothetical under discussion, the two attorneys are merely asking for information about, and are discussing, state programs. There is no attempt to influence administrative action. Consequently, there is no lobbying and no need for either attorney to register or report his or her activities.

> "6. A citizen wakes up one morning to find a bulldozer outside his house. The bulldozer operator indicates that he has been directed by the Michigan Department of Transportation to remove the house for a new freeway which will come through the site. The citizen calls his

attorney, and asks the attorney to stop the destruction of the citizen's house. The attorney calls the Director of the Michigan Department of Transportation who says that there is nothing that he can do since the matter has been determined by the Transportation Commission. The attorney then spends the weekend contacting several of the Commissioners of the Michigan Transportation Commission in an effort to stop the destruction of the house. While it turns out that the department made a mistake, the attorney is too late and the house is destroyed. The citizen pays his attorney $1,200 for his efforts. Is the attorney required to register as a lobbyist agent of the citizen within three days of receiving his fee?"

Under the facts postulated in hypothetical 6, the attorney is not required to register as a lobbyist agent. This conclusion is mandated by the fact that the attorney in question was retained to act on the homeowner's behalf to deal with a legal problem, namely, the pending destruction of the owner's house. Obviously, only an attorney licensed to practice in Michigan can represent the aggrieved citizen relative to the legal rights which were at issue. The fact that the lawyer chose to approach administrators rather than pursue some specific legal remedy, e.g. obtaining an injunction, does not change the nature of the attorney/client relationship. The attorney, of course, may have been guilty of using an improper (as well as ineffective) strategy, but the exercise of professional judgment in the election of remedies does not determine whether or not a relationship falls within the "practice of law" for purposes of the Act.

Inasmuch as your inquiry was presented as a series of "hypotheticals", this response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF:j

7-84-LD

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

April 30, 1984

Mr. John M. Amberger
Executive Director
Southeast Michigan Council of Governments
800 Book Building
Detroit, Michigan 48226

Dear Mr. Amberger:

This is in response to your request for a declaratory ruling concerning the applicability of the lobby act (the "Act"), 1978 PA 472, to the activities of the Southeast Michigan Council of Governments (SEMCOG). Your specific question is:

> "Does SEMCOG, a voluntary organization whose membership is comprised of 100% local elected officials designated by their individual units of government, come under the Act's jurisdiction or is it exempt?"

The Act has no provision which exempts an organization such as SEMCOG. Section 7 of the Act (MCL 4.417) exempts certain persons from becoming a lobbyist or lobbyist agent and includes in 7(b):

> "All elected or appointed public officials of state or local government who are acting in the course or scope of the office for no compensation other than that provided by law for the office."

Clearly SEMCOG is not an "elected or appointed public official," but "an association, committee or any other organization or group of persons acting jointly" which meets the definition of "person" under section 6(1) of the Act (MCL 4.416(1)). Consequently, SEMCOG becomes a lobbyist if it engages in lobbying and meets the expenditure threshold of the Act. The section 7(b) exemption applies only to each individual elected official. The exemption does not apply to the local governmental entity served by the elected official or to any group of which the elected official is a member.

This response is a declaratory ruling relating to the facts and questions you have presented.

Very truly yours,

Richard H. Austin
Secretary of State

RHA/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

23-84-LI

LANSING

MICHIGAN 48918

May 8, 1984

Frank H. Stevens
Michigan Association of Private
Campground Owners
P.O. Box 201
Novi, Michigan 48050

Dear Mr. Stevens:

This is in response to your inquiry concerning applicability of the lobby act (the Act), 1978 PA 472, to the Michigan Association of Private Campground Owners (MAPCO).

You state that MAPCO is a group of private campground owners organized to promote family camping. You further indicate:

> "The officers, directors, and members sometimes have reason to contact various State departments and/or legislators while striving toward our goals, and often we are consulted by State personnel. Because our members are scattered throughout the state, any reporting requirement would be a hardship and a laborious task to assemble and transmit the necessary information."

To avoid this inconvenience, you ask that the State of Michigan waive the Act's registration and reporting requirements whenever MAPCO members communicate with state legislators.

There is nothing in the Act or rules which authorizes the Department of State or any other agency to grant waivers to persons affected by the Act. Consequently, MAPCO must register with the Department and file periodic disclosure reports if MAPCO is a lobbyist as that term is used in the Act.

Pursuant to section 5(4) of the Act (MCL 4.415), an organization is a lobbyist if, in any 12 month period, it expends more than $1,000 for lobbying or more than $250 on lobbying a single public official. "Lobbying" is defined in section 5(2) as "communicating directly with an official in the executive branch of state goverment or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action."

The $1,000 and $250 thresholds established in section 5(4) are calculated pursuant to rule 21, 1981 AACS R4.421, which provides:

> "Rule 21. For the purpose of determining whether a person's expenditures for lobbying are more than $1,000.00 in value in any 12-month period, or are more than $250.00 in value in any 12-month period if expended on lobbying a single public official, the following expenditures shall be combined:
>
> (a) Expenditures made on behalf of a public official for the purpose of influencing legislative or administrative action.
>
> (b) Expenditures, other than travel expenses, incurred at the request or suggestion of a lobbyist agent or member of a lobbyist, or furnished for the assistance or use of a lobbyist agent or member of a lobbyist while engaged in lobbying.
>
> (c) The compensation paid or payable to lobbyist agents, employees of the lobbyist, and members of a lobbyist for that portion of their time devoted to lobbying."

The above provisions indicate that MAPCO is subject to the Act's registration and reporting requirements if its expenditures for lobbying, including compensation or reimbursement paid to its members, exceed $1,000 or $250 on lobbying a single public official in a 12 month period. However, MAPCO is not obligated to keep records or file reports relating to communications undertaken by its officers, directors or members for which no compensation or reimbursement is paid.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN, SECRETARY OF STATE

STATE TREASURY BUILDING

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MICHIGAN 48918

24-84-LI

June 4, 1984

Mr. Ralph J. Gerson, Director
Michigan Department of Commerce
P.O. Box 30004, Law Building
Lansing, Michigan 48909

Dear Mr. Gerson:

This is in response to your inquiry concerning the application of the lobby act (the "Act"), 1978 PA 472, to the Detroit Grand Prix which you describe as a "major international event" offering an opportunity "to promote the state's opportunities and potential to myriad individuals and companies." You point out that this promotional campaign "involves the help of individuals and firms already doing business in this State. As part of their participation, these individuals or firms contribute substantial sums of money and/or services." As examples, you indicate "some corporations or individuals defray the cost of food and beverages served to attendees at social functions held during the event. Others provide lodging or meeting rooms to various individuals or groups." You further advise that "It is likely that some of the contributors will be 'registered lobbyists' or 'lobbyist agents,' while others will not be so registered . . . (and) many of those attending the events will be 'public officials' of both State and local governments." You indicate that " . . . the expenditures are not being made for 'lobbying' as that term is defined in 1978 PA 472" and specifically ask "Is a person or group required to register and/or report as lobbying expenditures, any contribution made solely for the purpose of supporting the Detroit Grand Prix?"

In a declaratory ruling issued to S. Don Potter, on February 7, 1984, it was noted that:

> "'Lobbying' is defined in section 5(2) of the Act, MCL 4.415, as 'communicating directly with . . . an official in the legislative branch of state government for the purpose of influencing legislative or administrative action.' The purpose of holding (a) reception includes creation of good will and providing a place for members and associate members to meet with each other and with legislators. This is an annual event which is scheduled regardless of whether there are bills

> pending in the legislature of concern to MMEA or its members and associate members. While some lobbying may well take place at the reception, the event itself is not lobbying."

Rather than a reception, the Detroit Grand Prix is an event created and governed by the City Motor Vehicle Racing Act, 1981 PA 178, section 8 (MCL 257.1708) or which provides in pertinent part:

> "Sec. 8. A racing event held under the act . . . shall be considered as being for public purposes including the promotion of commerce and tourism and for the benefit of the citizens of the city and state."

The Detroit Grand Prix is not lobbying, because an event or function cannot, in and of itself, lobby. It does however create opportunities where lobbying can occur. You have described a general event (the Grand Prix) and a number of subordinate events, but you failed to provide any detail about the subordinate events. You do not disclose who actually puts on the event, what these functions are and who attends them. This response will therefore be general in nature.

In a letter to Joseph P. Bianco, Jr. dated February 3, 1984, the Department indicated, in the context of a "corporate good citizen," that:

> "The economic connection between (J.L.) Hudson's business as a retailer and the charitable and booster activities of these organizations is so indirect the Legislature could not have intended that these pro bono activities be lobbying. This intention is supported by the fact that making these activities lobbying would discourage corporate participation on behalf of community organizations, an effect the Legislature would not seek."

This "good citizen theory" is even more compelling when it is understood that the Legislature, in enacting 1981 PA 178 (quoted in part supra) determined that such events are "considered as being for public purposes including the promotion of commerce and tourism and for the benefit of the citizens of the city and state." Reading these statutes together, one reaches the conclusion that a person or group is generally not required to register and/or report as lobbying expenditures any contributions made solely for the purpose of supporting the Detroit Grand Prix, except as provided below.

You indicate it is likely that some of the contributors will be "registered lobbyists" or "lobbyist agents" and that many of those attending will be "public officials" of both state and local governments. Section 8(1)(b)(i) of the Act (MCL 4.418) requires lobbyists and lobbyist agents to report "expenditures for food and beverage provided for public officials as specified in subsection (2)." Section 8(2) states:

> "(2) Expenditures for food and beverage provided a public official shall be reported if the expenditures for that public official exceed

> $25.00 in any month covered by the report or $150.00 during that calendar year from January 1 through the month covered by the report. The report shall include the name and title or office of the public official and the expenditures on that public official for the months covered by the report and for the year. Where more than 1 public official is provided food and beverage and a single check is rendered, the report may reflect the average amount of the check for each public official. If the expenditures are a result of an event at which more than 25 public officials were in attendance, or, are a result of an event to which an entire standing committee of the legislature has been invited in writing to be informed concerning a bill which has been assigned to that standing committee, a lobbyist or a lobbyist agent shall report the total amount expended on the public officials in attendance for food and beverage and shall not be required to list individually. In reporting those amounts, the lobbyist or lobbyist agent shall file a statement providing a description by category of the persons in attendance and the nature of each event or function held during the preceding reporting period."

Expenditures for food and beverage provided public officials are not qualified by the phrase "for lobbying." This is a legislative determination that all food and beverages provided public officials by a lobbyist or lobbyist agent must be reported, regardless of the reason for those expenditures.

If the "corporations or individuals" who defray the cost of food and beverages served during the event meet the statutory definition of lobbyist or lobbyist agent, as you indicate some may, then food or beverage provided to "public officials," as that term is defined in the Act, must be reported.

You should be further advised that section 11(2) of the Act and rule 71 of the Administrative Rules promulgated to implement the Act (R 4.473) strictly prohibit the giving of gifts by lobbyist or lobbyist agents, or anyone acting on behalf of a lobbyist or lobbyist agent, to public officials. A violation of section 11(2) is a felony if the gift is worth more than $3,000.00, and a misdemeanor if the gift is worth between $25.00 and $3,000.00. It is the Department's position that if a corporation or other entity which is a lobbyist or lobbyist agent pays the bill for lodging or other expenses for a public official, such payment would be a gift. This would also be true if a lobbyist or lobbyist agent provides tickets for an event to a public official or provides anything else falling within the definition of "gift" found in section 4(1) of the Act.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

25-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

June 7, 1984

Representative Robert D. McGee
State Representative
24th District
State Capitol
Lansing, Michigan 48909

Dear Representative McGee:

This is in response to your request for a ruling pursuant to the lobby act, 1978 PA 472, (the "Act"). The concern you express in your letter relates to state employees who have refused to provide you with information citing the existence of the lobby act as their reason for being unable to assist you.

The Act regulates lobbying which is defined in section 5(2) (MCL 4.415) as follows:

> "(2) 'Lobbying' means communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action. Lobbying does not include the providing of technical information by a person other than a person as defined in subsection (5) or an employee of a person as defined in subsection (5) when appearing before an officially convened legislative committee or executive department hearing panel. As used in this subsection, 'technical information' means empirically verifiable data provided by a person recognized as an expert in the subject area to which the information provided is related."

The definition of the term influencing used in the act is set forth in section 5(3):

> "(3) 'Influencing' means promoting, supporting, affecting, modifying, opposing or delaying by any means, including the providing of or use of information, statutes, studies, or analysis."

State executive branch employees are specifically brought within the scope of the Act by section 5(7). However, it is also true that not every communication between a covered individual and a public official is lobbying.

Department personnel have consistently advised state agencies that responses to legislative inquiries are not necessarily included in the Act's coverage. One of the functions of state agencies is to provide information with respect to the requirements and operations of government programs. The lobby act has not changed this.

However, when an executive branch employee attempts to influence legislative action by directly communicating with a public official any expenditure made for that communication is a lobbying expenditure. In addition, it should be noted that some agencies have instructed their employees to channel legislative contacts through a central office.

The Department of State lacks the authority to direct the activities of other state agencies. This Department has centralized its lobbying efforts to insure that legislative contacts reflect the views of the Secretary of State. On the other hand, employees of the Department of State have been instructed to provide legislators with requested information and to respond to questions regarding procedures utilized in implementing the various laws administered by the Department.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

June 11, 1984

Mr. Timothy Downs
Craig, Farber, Downs & Dise
Attorneys & Counselors at Law
1217 First National Building
Detroit, Michigan 48226

Dear Mr. Downs:

This is in response to your inquiry regarding the lobby act (the "Act"), 1978 PA 472. Your assumptions and questions are set out and answered below.

> "1. Assume the Mayor of a municipality personally and regularly is given tickets to sporting events, plays and other entertainment functions. Assume that the provider(s) of such tickets is, in some instances, a sports corporation who is registered as a lobbyist. Assume that the gift of such tickets is not made with any expectation on the part of the giver that the tickets will be passed on by the recipient to an 'Official', although it is known to the giver that extra tickets are regularly given by the Mayor (or given by others at the Mayor's direction) to other persons, some of whom may be 'Officials'."

Under the hypothetical fact situation the sports corporation has no exposure under the Act. The mayor is not a "public official" as defined in the Act, so the Act does not regulate direct communications or gifts to the mayor. In addition, the mayor is not acting on behalf of the sports corporation when the mayor gives away some of the tickets. Therefore, the sports corporation is not giving a gift to those "public officials" who ultimately receive the tickets.

Even though the mayor did not pay for the tickets, passing them on to public officials constitutes a gift to the public officials from the mayor. Assuming the mayor is elected by the public, only lobbies on behalf of the municipality, and receives no compensation for lobbying beyond the mayoral salary, the gift of the tickets is not prohibited because the mayor is excluded from the definition of lobbyist agent by section 5(7) of the Act (MCL 4.415).

> "2. Are expenditures made by MCLA 4.415(7)(b) person for lobbying

purposes required to be reported by such person's governmental entity, which is registered as a lobbyist? Particularly, are expenditures for food and beverage as described by MCLA 4.418(2) required to be reported?"

Section 5(7)(b) (MCL 4.415) exempts certain elected and appointed public officials of state and local governments from the Act's provisions. A person who is exempt from being a lobbyist or lobbyist agent because of that provision and who is not brought back into the definition of lobbyist or lobbyist agent by section 5(7)(c), which governs employees of government and certain boards and commissions, may lobby without becomming a lobbyist or a lobbyist agent. Lobbying expenditures made by an exempt person from that person's own funds are not reported by anyone unless a lobbyist or lobbyist agent reimburses the exempt person. For example, food and beverages provided to public officials by an exempt person, but paid for or reimbursed by the government entity, must be reported on the government entity's lobbyist report.

These are general responses to general hypothetical questions. More specific questions will be answered as they are presented. This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos/js

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

27-84-LI

June 11, 1984

Ted Vliek
Administrative Assistant to the Superintendent and
Secretary to the Board of Education
Portage Public Schools
8111 South Westnedge
Portage, Michigan 49002

Dear Mr. Vliek

This is in response to your letter regarding the scope of the public official exemption contained in the lobby act, 1978 PA 472 (the "Act").

You outline two factual situations which you believe may result in your activities being exempt from registration or reporting under the Act, by virtue of the exemption for certain public officials in section 5(7)(b) of the Act (MCL 4.415).

In the first situation you point out that you are an employee of the school district. You are the administrative assistant to the superintendent and assume the duties of the superintendent in his absence. The first question leads from these facts as follows:

> "Since the superintendent of schools is exempt from P.A. 472, 1978, would not I also be exempt in those situations where my lobbying was directly related to the Portage Schools and where I served as an extension of the superintendent's office or in his behalf?"

Section 5(7)(b) provides that the terms lobbyist or lobbyist agent do not include:

> "(b) All elected or appointed public officials of state or local government who are acting in the course or scope of the office for no compensation, other than that provided by law for the office."

The application of this provision has been previously discussed in the attached letter to the executive director of the Michigan Association of School Administrators. In the letter it was concluded that the school superintendent

is the only appointed school administrator qualifying for the exemption. Other school administrators are employees who are specifically required to register and report when their activities reach the lobbyist agent threshold set forth in the Act. The exemption for public officials is personal to the individual occupying the office and does not extend to other individuals.

The second issue you raise is whether the fact that you are the secretary of the board of trustees makes you a public official and therefore exempt from registering and reporting. As previously indicated the Department has concluded that only elected board members and school superintendents are public officials who qualify for the exemption set forth in section 5(7)(b).

This letter is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos /jp

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw
Attachment

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

28-84-LI

June 19, 1984

Charles E. Cribley, Executive Secretary
State Fire Safety Board
7150 Harris Drive
Lansing, Michigan 48913

Dear Mr. Cribley:

This is in response to your inquiry concerning applicability of the lobby act (the "Act"), 1978 PA 472, to the following state of facts:

> "As a result of numerous activities in a variety of areas, an incorporated hospital qualifies under the act and has registered as a lobbyist. In an ongoing business setting, the hospital utilizes the services of an architectural firm. A partner of the architectural firm, who has a pecuniary interest in all business of the firm, is also a public official by virtue of his membership on the State Fire Safety Board."

In a recent telephone conversation, you explained the transactions between the hospital and the architectural firm are directly related to the continual expansion, renovation or improvement of the hospital's facilities. You ask whether the hospital, as a lobbyist, is required to report transactions with the architectural firm which are unrelated to the partner's status as a public official.

Pursuant to section 8(1) of the Act (MCL 4.418), a lobbyist must file reports on January 31 and August 31 of each year. In addition to other information required by this section, each report must contain the following:

> "Sec. 8. (1)(c) An account of every financial transaction during the immediately preceding reporting period between the lobbyist or lobbyist agent, or a person acting on behalf of the lobbyist or lobbyist agent, and a public official or a member of the public official's immediate family, or a business with which the individual is associated in which goods and services having value of at least $500.00 are involved. The account shall include the date and nature of the transaction, the parties to the transaction, and the amount involved in the transaction. This subdivision shall not apply to a financial

> transaction in the ordinary course of the business of the lobbyist, if the primary business of the lobbyist is other than lobbying, and if consideration of equal or greater value is received by the lobbyist. This subdivision shall not apply to a transaction undertaken in the ordinary course of the lobbyist's business, in which fair market value is given or received for a benefit conferred."

"Financial transaction" is defined in section 3(3) of the Act (MCL 4.413) as a "loan, purchase, sale or other type of transfer or exchange of money, goods, other property, or services for value." For purposes of discussion, it is assumed the transactions between the hospital and architectural firm fall within this definition and involve goods or services of at least $500 in value.

Section 8(1)(c) indicates that any financial transaction of $500 or more between a lobbyist and a business with which a public official is associated must be disclosed by the lobbyist in its semi-annual reports regardless of the transaction's purpose. However, if the lobbyist's primary business is not lobbying, a financial transaction which is in the lobbyist's ordinary course of business is exempt from disclosure, provided the lobbyist receives "consideration of equal or greater value." In addition, a lobbyist is not required to report "a transaction undertaken in the ordinary course of the lobbyist's business, in which fair market value is given or received for a benefit conferred."

A transaction is "in the ordinary course of business" if it is a normal, usual or customary aspect of that business. In the case of a hospital, this includes normal or usual matters relating to the provision of health care services, such as the purchase of pharmaceuticals. However, it does not appear that transactions between a hospital and a group of architects are a part of the hospital's ordinary business. Consequently, the financial transactions referred to in your letter do not qualify for the first exemption found in section 8(1)(c) because they are not "in the ordinary course of the business of the lobbyist."

On the other hand, the transactions between the hospital and Safety Board member's architectural firm are directly related to maintaining or improving the hospital's facilities. For example, the hospital may consult the firm when renovating a ward or constructing a new wing. While such transactions are not, strictly speaking, a part of the hospital's ordinary business, they are essential if the hospital is to provide quality health care services.

Given the integral relationship between the services provided by the architectural firm and the hospital's primary business, it must be concluded the transactions between the hospital and firm are "undertaken" in furtherance of the hospital's ordinary business. As noted previously, the last sentence of section 8(1)(c) exempts financial transactions "undertaken" in the ordinary course of a lobbyist's business in which fair market value is given or received for a benefit conferred. Therefore, if the financial transactions between the hospital and public official's business are at fair market value, they are exempt from disclosure under the Act. This exemption does not apply, however, to transac-

tions which are for the purpose of influencing the member of the architectural firm when acting as a public official.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

29-84-LI

LANSING

MICHIGAN 48918

June 22, 1984

David L. Ball, Jr.
Methodist Children's Home Society
Children's Village
26645 W. Six Mile Road
Detroit, Michigan 48240

Dear Mr. Ball:

This is in response to your inquiry concerning applicability of the lobby act (the "Act"), 1978 PA 472, to the Methodist Children's Home Society. Specifically, you ask whether the Society, which you describe as an "organic part" of the United Methodist Church, is exempt from the requirements of the Act.

In Pletz v Secretary of State, 125 Mich App 335 (1983), the Court of Appeals held that "in order to preserve the constitutionality of the (lobby) act, we interpret it to except churches and religious institutions from its coverage and application." The Court reasoned that requiring churches and religious institutions to register as lobbyists and report their lobbying expenditures would violate the First Amendment "by creating excessive and enduring entanglements between state government and religious institutions."

According to your letter and accompanying materials, the Methodist Children's Home Society is partially funded by the United Methodist Church, to whom the Society reports its activities at the Church's two Annual Conferences. The Church also is responsible for selecting a majority of the Society's Board of Directors and controls the selection of the remaining directors. Thus, it appears that the Methodist Children's Home Society falls within the exemption created by the Court of Appeals for churches and religious institutions, and the Society is not subject to the Act's registration and reporting requirements.

This response is informational only and does not constitute a declaratory ruling because none was requested.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

30-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

June 22, 1984

James Stewart
Eaton County Controller's Office
1045 Independence Boulevard
Charlotte, Michigan 48813

Dear Mr. Stewart:

This is in response to your request for a declaratory ruling concerning applicability of the lobby act (the "Act"), 1978 PA 472, to persons employed by elected county officials and the county controller. Specifically, you ask whether staff members of exempt public officials are subject to the Act's requirements "while preparing resolutions passed by the Board of Commissioners to be sent to the appropriate State Legislators."

The issue you raise is based upon your understanding that the Board of Commissioners and the county controller are excluded from the operation of the Act. While it is clear that elected county officials, such as commissioners, are exempt, your assumption that the controller, who is appointed to office, is not required to register or report his or her lobbying activities must be examined before proceeding further.

Persons who are exempt from the Act are identified in section 5(7) (MCL 4.415), which provides in relevant part:

> "Sec. 5. (7) Lobbyist or lobbyist agent does not include:
>
> (b) All elected or appointed public officials of state or local government who are acting in the course or scope of the office for no compensation, other than that provided by law for the office.
>
> (c) For the purposes of this act, subdivision (b) shall not include:
>
> (ii) Employees of townships, villages, cities, counties or school boards."

The Department has previously indicated the exemption created by section 5(7)(b) applies only to officials who serve in autonomous, policymaking capacities. As stated in a December 7, 1983, letter to Senator Ed Fredricks, a person serves in a policymaking capacity if the person's responsibilities are of broad scope and not clearly defined. On the other hand, an individual who operates at the direction or control of another or within specified boundaries does not serve in a policymaking position and is not a public official for purposes of the Act.

According to section 13b of 1927 PA 257, as amended (MCL 46.13b), a county controller is the political subdivision's chief accounting officer whose broad range of duties include discretion or authority in matters involving the county. For example, the controller is the only official who may bind the county to a contract for the purchase of materials and supplies. In addition, the controller is authorized to operate, maintain and repair the county courthouse, jail, and lighting, power or heating plant, subject only to the limitation that the controller "shall not create any liability in excess of the appropriations theretofore made by the board of supervisors." It therefore appears that a county controller serves in a policymaking capacity vis-a-vis the county, and you are correct in your assumption that the controller is excluded from the Act's requirements by section 5(7)(b).

Turning to your question, section 5(7)(c) specifically provides that employees of townships, villages, cities, counties or school boards are not included within the section 5(7)(b) exemption. Thus, it is clear that a political subdivision must report expenditures it makes to employees who communicate directly with officials in the executive or legislative branch of state government for the purpose of influencing legislative or administrative action. However, the Department has not, prior to your request, thoroughly considered whether a person employed by an exempt public official is subject to the Act's requirements when the person makes no direct communication but merely assists the exempt official in his or her lobbying effort.

An elected or appointed public official who qualifies for the section 5(7)(b) exemption is not required to register as a lobbyist or lobbyist agent or file periodic disclosure reports. By never attaining the status of lobbyist or lobbyist agent, an exempt official is also absolved from the recordkeeping requirements of section 9 (MCL 4.419). It therefore appears that an elected or appointed official of state or local government acting in the course or scope of office for no additional compensation is totally excluded from the Act's requirements, unless otherwise specifically provided.

Given the complete exemption granted to qualified public officials, it must be concluded the legislature did not intend to require a political subdivision to record or report expenditures made to a person who works for an exempt public official, where the employee's participation is limited to assisting in the preparation of a communication made directly by the public official. To interpret the Act otherwise would create an unintended burden upon exempt officials by requiring them to identify for the benefit of their employees those com-

munications which are intended for lobbying. Therefore, time an employee spends typing, copying, posting or otherwise assisting an exempt public official's communication for lobbying is viewed as part of the official's direct communication and does not have to be accounted for by the lobbyist.

In answer to your question, Eaton County is not required to report compensation or other expenditures paid to an employee while preparing a resolution passed by the Board of Commissioners for transmittal by the commissioners to the legislature. However, if an employee lobbies an official in the executive or legislative branch directly or assists a non-exempt person in preparing to lobby, the county must report any expenditures made, even though the employee is acting pursuant to an exempt public official's instructions.

This response is informational only and does not constitute a declaratory ruling because your request did not contain a clear, concise and complete statement of facts as required by rule 3(2), 1981 AACS R4.413.

Very truly yours,

Phillip T. Frangos

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw